Filed 3/25/09 P. v. Hernandez CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. WILBUR HERNANDEZ, Defendant and Appellant.	B207145 (Los Angeles County Super. Ct. No. NA076167)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles D. Sheldon, Judge. Affirmed.

Jonathan P. Milberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Keith H. Borjon and A. Scott Hayward, Deputy Attorneys General, for Plaintiff and Respondent.

Wilbur Hernandez (defendant) pleaded guilty to two felony counts of false personation (counts 1 & 2) (Pen. Code, § 529),[1] felony possession of a forged driver's license (count 3) (§ 470, subd. (b)), and driving with a suspended license (count 4) (Veh. Code, § 14601.1, subd. (a)). Defendant brought a motion to dismiss the felony prosecution on the grounds that it was improperly successive to the prior misdemeanor conviction of driving under the influence (Veh. Code, § 23152, subd. (b)), in violation of state law and federal constitutional principles. The motion was denied. Thereafter defendant entered a negotiated plea of guilty to all counts. In accordance with the negotiated plea agreement, the trial court struck defendant's prior conviction allegation and sentenced him to three years in state prison.

The trial court that took the instant plea granted defendant a certificate of probable cause to appeal on the ground that the felony prosecutions should have been dismissed as an unlawful successive prosecution under the rule of *Kellett v. Superior Court* (1966) 63 Cal.2d 822 (*Kellett*). Defendant now appeals, claiming first that the issue is cognizable on appeal, and secondly, that the felony prosecution was barred by section 654 and the rule of *Kellett*.

FACTUAL AND PROCEDURAL BACKGROUND

On April 24, 2007, defendant was stopped for a traffic violation and arrested for driving under the influence (DUI). Defendant presented officers with a driver's license bearing the name of Eric John Mafnas and defendant's photograph. Defendant was booked under the name of Eric John Mafnas. Defendant appeared before Judge James Otto on May 15, 2007, at the Long Beach courthouse under the name of Eric John Mafnas in case No. 7LT02926 and was arraigned on one count of violating Vehicle Code section 23152, subdivision (a) and one count of violating Vehicle Code section 23152, subdivision (b).[2] Defendant pleaded not guilty.

---

[1] All further references to statutes are to the Penal Code unless stated otherwise.

[2] Vehicle Code section 23152 provides in pertinent part: "(a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the

In September 2007, after the real Eric John Mafnas contacted Los Angeles police when he discovered someone had suffered a DUI arrest using his name and driver's license, an investigation led police to defendant. Defendant was arrested for false personation on October 15, 2007. The next day, a felony complaint was executed. Defendant was arraigned on all four counts on November 5, 2007, and he pleaded not guilty.

On January 28, 2008, defendant pleaded nolo contendere to a misdemeanor violation of Vehicle Code section 23152, subdivision (b) in count 2 of case No. 7LT02926. Count 1 was dismissed. Imposition of sentence was suspended and defendant was placed on summary probation and released.

Later the same day, defendant's preliminary hearing in case No. NA076167 on the false personation and related charges was held. Defendant was held to answer for the felony charges. An information was filed on February 11, 2008, charging defendant with felony false personation on April 24, 2007, and May 15, 2007, in counts 1 and 2. Count 3 charged him with felony possession of a forged driver's license on April 24, 2007, and count 4 charged him with misdemeanor driving under a suspended license on April 24, 2007. Defendant pleaded not guilty.

On March 5, 2008, defendant filed a motion to dismiss the instant case due to successive prosecution and double jeopardy under section 654. In the written motion, defendant contended that the prosecutors had actual knowledge of his January 28, 2008 DUI misdemeanor conviction and nevertheless failed to unite that offense with the charges in the information filed February 11, 2008. Defendant claimed that the misdemeanor conviction barred the felony prosecution.

At the hearing on March 19, 2008, defendant argued that there was nothing that prohibited the misdemeanor DUI case from being joined in the felony "complaint" when

---

combined influence of any alcoholic beverage and drug, to drive a vehicle. [¶] (b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle."

it was originally filed. Defendant's only objective in all the offenses was to beat the DUI, and the evidence would have been cross-admissible. The misdemeanor case was "alive" for three or four months while the felony was pending. Under *Kellett*, the matters should have been tried together. Since they were not, the felony matters should be dismissed.

After hearing argument, the trial court ruled that there was no mandatory joinder. The trial court stated that the offenses did not occur during the same course of conduct, and the felony case should not be dismissed under *Kellett* or any law that defendant cited.

Defendant then pleaded guilty in case No. NA076167 to counts 1 through 4 under the terms of a plea bargain in which the trial court would strike defendant's prior conviction of a serious felony and sentence him to three years in prison. The sentence consisted of the high term on count 1, two concurrent years on count 2, two concurrent years on count 3, and six months concurrent on count 4. In the DUI case, the trial court revoked probation and sentenced defendant to six months' concurrent time. The trial court certified the *Kellett* issue for appeal.

DISCUSSION

I. Defendant's Argument

Defendant contends that section 654 and the *Kellett* rule barred the felony prosecution that occurred after his conviction for the misdemeanor DUI offense. He argues that the defense motion to dismiss the felony charges should have been granted, and the felony convictions must be reversed.

II. Relevant Authority

Section 654 provides in pertinent part: "(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. *An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other*." (Italics added.) Section 954 provides for joinder of offenses connected together in their commission or offenses of the same class.

In interpreting sections 654 and 954 in conjunction with the due process clause of the Constitution, the court stated in *Kellett* that "[i]f needless harassment and the waste of public funds are to be avoided, some acts that are divisible for the purpose of punishment must be regarded as being too interrelated to permit their being prosecuted successively. When there is a course of conduct involving several physical acts, the actor's intent or objective and the number of victims involved, which are crucial in determining the permissible punishment, may be immaterial when successive prosecutions are attempted." (*Kellett*, *supra*, 63 Cal.2d at p. 827, fn. omitted.)

Kellett concluded that, "[w]hen . . . the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence." (*Kellett*, *supra*, 63 Cal.2d at p. 827.)

The existence of a single course of conduct as required by *Kellett* has been found where the defendant was prosecuted for 10 counts of grand theft and subsequently charged with 10 counts of forgery and 10 counts of presenting false documents based on the same evidence (*Sanders v. Superior Court* (1999) 76 Cal.App.4th 609, 612, 615); where the defendant was charged with drunk driving and then with theft of the car and joy riding in the car in which he was found (*People v. Flint* (1975) 51 Cal.App.3d 333, 335 (*Flint*)); where the defendant was charged with committing an armed robbery and subsequently with acting as an accessory to the same robbery (*In re Benny G.* (1972) 24 Cal.App.3d 371, 373-374); and where the defendant was charged with an armed robbery and thereafter with being a felon in possession of the firearm used in the robbery (*People v. Wasley* (1970) 11 Cal.App.3d 121, 122-123).

III. Defendant's Motion Properly Denied

Whether the *Kellett* rule applies must be determined on a case-by-case basis. (*People v. Britt* (2004) 32 Cal.4th 944, 955.) In this case, for several reasons, we

conclude that *Kellett* does not apply. Therefore, the trial court properly denied defendant's motion to dismiss the charges in case No. NA076167.[3]

In *Kellett*, the defendant was arrested for standing on a public sidewalk with a pistol in his hand. He was first charged in municipal court with a misdemeanor violation of section 417 (exhibiting a firearm in a threatening manner). After a preliminary hearing revealed that the defendant had previously been convicted of a felony, he was charged in superior court with felony possession of a concealable weapon. (§ 12021.) He pleaded guilty to the misdemeanor and then moved to dismiss the felony information on the ground that it was barred by section 654. (*Kellett*, *supra*, 63 Cal.2d at p. 824.) The motion was denied, and the defendant sought and obtained a peremptory writ of prohibition to prevent his trial. (*Id*. at pp. 824, 829.)

The *Kellett* court explained that section 654's preclusion of multiple prosecutions is separate and distinct from its preclusion of multiple punishments--double prosecution may be precluded even when double punishment is permissible. (*Kellett*, *supra*, 63 Cal.2d at p. 825.) The court observed that the Legislature, in a series of amendments to section 954, had expressed its intent to require joinder of related offenses in a single prosecution. (*Kellett*, at p. 826.) *Kellett* held: "[I]f an act or course of criminal conduct can be punished only once under section 654, either an acquittal or conviction and sentence under one penal statute will preclude subsequent prosecution in a separate proceeding under any other penal statute. [Citation.]"[4] (*Id*. at p. 828.)

---

[3] Respondent concedes that the *Kellett* issue is appealable and we agree. Therefore we do not discuss appealability.

[4] The parties did not address the fact that a defendant must be sentenced after conviction in order to preclude a subsequent prosecution for a related offense under section 654 and *Kellett*. (§ 654; *Kellett*, *supra*, 63 Cal.2d at p. 827; see also *People v. Tideman* (1962) 57 Cal.2d 574, 586; *In re R.L.* (2009) 170 Cal.App.4th 1339, 1343-1344; *People v. Andrade* (1978) 86 Cal.App.3d 963, 971; *People v. Hartfield* (1970) 11 Cal.App.3d 1073, 1080; *People v. Winchell* (1967) 248 Cal.App.2d 580, 588.) Here, the trial court suspended imposition of sentence on the DUI case and granted defendant probation. After defendant pleaded guilty to the felony charges, the trial court sentenced him to six months on the DUI case. We need not decide whether application of the

A careful reading of *Flint*, upon which defendant heavily relies, shows that although *Flint* and the instant case are superficially similar in their factual scenarios, the legal principles *Flint* sets forth in its interpretation of *Kellett* do not support defendant's claim. In *Flint*, a man reported that his Corvette had been stolen sometime between May 17 and May 18, 1974. In the early hours of May 17, 1974, a Highway Patrol officer found Flint sitting in a Corvette that was straddling railroad tracks. Flint said he had borrowed the car from a friend. He failed field sobriety tests and was arrested on suspicion of driving under the influence of alcohol. The Corvette was impounded. On the same day as his arrest, Flint was charged with drunk driving, to which he pleaded not guilty in Culver City Municipal Court. On May 20, 1974, Flint was charged with theft and joy riding violations in the West Los Angeles Municipal Court. On June 14, 1974, Flint pleaded guilty to the drunk driving charge in Culver City. In July 1974, when he was held to answer in the theft and joy riding case, Flint moved to dismiss the charges on grounds of multiple prosecution, and the motion was granted. The trial court found that, although different prosecutors had filed the misdemeanor and felony complaints, each should have been aware of the other's filing. On appeal, the People did not challenge this finding and contended only that they could have deliberately chosen to prosecute Flint in separate proceedings. (*Flint*, *supra*, 51 Cal.App.3d at p. 335.)

Flint rejected tests that had been espoused in prior cases for determining whether the same act or course of conduct played "a significant part" (citing *Kellett*) in each crime in favor of an analysis of "the totality of the facts, examined in light of the legislative goals of sections 654 and 954, as explained in *Kellett*." (*Flint*, *supra*, 51 Cal.App.3d at pp. 336-337; see also *People v. Hurtado* (1977) 67 Cal.App.3d 633, 636.) With this "totality of the facts" analysis, *Flint* harmonized prior cases that had employed different tests in reaching the conclusion that the *Kellett* rule was not violated. (*Flint*, at p. 337.) In each case, the *Flint* court concluded, "the practicalities of the two crimes demanded

---

Kellett rule was triggered by defendant's grant of probation, since we believe the rule does not apply to defendant's case for other reasons.

separate proofs." (*Id*. at pp. 337-338.) In both *Kellett* and in *Flint*, prosecuting each defendant a second time would have meant recycling much of the same evidence that the People had used to support the first prosecutions. (*Flint*, at p. 338.) The *Flint* court pointed out that "the same incident which furnished the evidence that defendant was driving in an intoxicated condition also supplied proof that what he was driving was an automobile he had stolen." (*Ibid*.)

The *Flint* court acknowledged that, had the facts surrounding Flint's offenses been slightly different, "the need to furnish different proofs and defenses to each charge might minimize if not obliterate 'needless harassment and the waste of public funds' and one could be hard put to find 'the same act or course of conduct' which forms a 'significant part' with respect to each [of Flint's] crime[s]." (*Flint, supra*, 51 Cal.App.3d at pp. 338-339.)

Such a factual situation, in which "the need to furnish different proofs" is abundantly clear, occurs in the instant case. There is almost no overlap in terms of the proof required in defendant's DUI case and the felony false personation case. The proof of defendant's DUI was his blood-alcohol level as evidenced by the tests to which he was subjected. The proof of defendant's false personation was supplied by the phony driver's license he used for identification and his false self-identification as Eric John Mafnas before the court when he first appeared on the DUI case. The record shows that defendant was stopped for running a red light, and the fact that the stop resulted in an arrest for DUI need not have been mentioned in a trial on the false personation and accompanying charges. The slight evidentiary overlap consisting of the fact that defendant was stopped for a traffic violation did not require the prosecutor to consolidate the two actions. Also, while the *Flint* court emphasized that it was the *car* that was the link between Flint's two offenses, in defendant's case, driving a car while having a blood alcohol level of 0.08 or more has nothing to do with impersonating another individual, even if the means of documenting the impersonation was a driver's license. (See *Flint, supra*, 51 Cal.App.3d at p. 338.)

In addition, we observe that the *Kellett* court addressed other factors that bear upon the instant case. *Kellett* stated, "[I]n many places felonies and misdemeanors are usually prosecuted by different public law offices and . . . there is a risk that those in charge of misdemeanor prosecutions may proceed without adequately assessing the seriousness of a defendant's conduct or considering whether a felony prosecution should be undertaken. When the responsibility for the prosecution for the higher offense lies with a different public law office there is also the risk that a well advised defendant may plead guilty to a misdemeanor to foreclose a subsequent felony prosecution the misdemeanor prosecutor may be unaware of or may choose to ignore. . . . In such situations the risk that there may be waste and harassment through both a misdemeanor and felony prosecution may be outweighed by the risk that a defendant guilty of a felony may escape proper punishment. Accordingly, in such cases section 654 does not bar a subsequent felony prosecution except to the extent that such prosecution is barred by that section's preclusion of multiple punishment." (*Kellett*, *supra*, 63 Cal.2d at pp. 827-828.)

The record in this case reveals that the Long Beach City Attorney handled defendant's DUI case from arraignment to plea. The only appearance by a deputy district attorney in that case (No. 7LT02926) occurred on the day of the felony preliminary hearing. The district attorney represented the People in the proceeding in which Judge Otto ordered the DUI case to Department SOF to trail the false personation matter, which was set for preliminary hearing. At this proceeding, defendant was represented by Jeffrey Gray and the People were represented by District Attorney Jennifer Hall Cops, who was to appear at the preliminary hearing in the false personation case. The very next entry for the DUI case documents a proceeding occurring a half hour later in which defendant pleaded guilty in Department SOF before Judge Rodriguez to the DUI case with the People represented by a city attorney once again and defendant still represented by Mr. Gray.

The reason why defendant entered a guilty plea in the DUI case on the same morning as his preliminary hearing on the felony case is explained neither by the record nor by defendant. It is not clear whether the district attorney was aware that defendant

was about to plead guilty to the DUI case when it was transferred, or whether the district attorney relied on the DUI matter being ordered to "trail" the felony matters. Therefore, in this case, there were two "different public law office[s]," and the defendant did plead rather quickly in the DUI case, even though Judge Otto ordered that case to trail the false personation case. Under these circumstances, it is not apparent that the objectives of the *Kellett* rule would have been well served. (*Kellett, supra*, 63 Cal.2d at pp. 827-828; see also *People v. Andrade, supra*, 86 Cal.App.3d at p. 970; *People v. Ward* (1973) 30 Cal.App.3d 130, 136-137; *People* v. *Hartfield, supra*, 11 Cal.App.3d 1073, 1080; *Hampton v. Municipal Court* (1966) 242 Cal.App.2d 689, 694.)

Finally, it is worthy of note that defendant did not seek to have the cases consolidated, even though he now claims the benefit of a statute designed to prevent government harassment of a criminally accused individual. (*People v. Hartfield, supra*, 11 Cal.App.3d at p. 1080.) Defendant was clearly aware of each separate prosecution and did not oppose them. In order to avoid "harassment," defendant could have moved for consolidation of the charges pursuant to section 954. Therefore, if any "harassment" occurred, it would appear to be self-inflicted. (See *Stackhouse v. Municipal Court* (1976) 63 Cal.App.3d 243, 247.) Moreover, this is not a case where the People unfairly sought to increase defendant's vulnerability to prosecution and punishment by initiating a second prosecution based on the same event. (See, e.g., *In re Grossi* (1967) 248 Cal.App.2d 315, 318-319 [After prosecuting district attorney agreed to defendant's guilty plea to one of two charges, supervising district attorney refiled dismissed charge in belief trial court had erroneously refused continuance to obtain proof of both charges]; *People v. Eckley* (1973) 33 Cal.App.3d 91, 98.) As for wasting public funds, there does not appear to be any such result in the instant case. The plea in the DUI case and the preliminary hearing on the felonies occurred on the same day. The trial court heard defendant's motion to dismiss and took his nolo contendere plea to the false personation and other charges on the same day as well (March 19, 2008). Therefore, the legislative purposes of sections 654 and 954 as interpreted by *Kellett* of "protect[ing] criminal defendants, public funds

and judicial resources from successive prosecutions" of closely related crimes would not be served by dismissing defendant's felony case. (*Stackhouse, supra*, at pp. 246-247.)

As this court stated in *People v. Eckley*, *supra*, 33 Cal.App.3d at page 95, courts must engage in a balancing process in light of the objectives of the *Kellett* rule, and each case must be decided on its own facts and circumstances. (See also *People v. Britt*, *supra*, 32 Cal.4th at p. 955; *Stackhouse v. Municipal Court*, *supra*, 63 Cal.App.3d at p. 247.) The facts of the instant case, examined in light of the legislative purposes of sections 654 and 954 as interpreted by *Kellett*, lead to the conclusion that the subsequent prosecution was proper. The risk that defendant would escape punishment for his false personation offenses far outweighed the risk of strain on judicial resources or harassment of defendant. Therefore, given the totality of the circumstances surrounding the offenses and the proceedings below, the trial court properly denied defendant's motion to dismiss.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST